Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1996

LAWRENCE ROSANO,

Petitioner,

- v -

ADELPHI UNIVERSITY, JOSEPH CRAFA, NICHOLAS MANOBIANCO and VILLAGE OF GARDEN CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), this Court granted a new trial because of the improper introduction of evidence of a defendant's past criminal record holding that cautionary instructions would not cure the error. Against this background, the first question presented here is:

   > Whether questioning by defense counsel, in violation of a pre-trial order not to mention the civil rights Petitioner's past misdemeanor criminal record and incarceration (which incarceration occurred *after* the 1986-1988 incidents at Adelphi University and which did not involve a felony nor *crimen falsi* misdemeanor conviction) and litigiousness, in the absence of any cautionary instruction by the trial court, did so taint the case by shifting the jury's focus from the worthiness of the Petitioner's claims to the moral worth of the Petitioner himself, that a new trial was required?

2. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970), this Court held that a private Defendant may be held liable as "a willful participant in joint activity with the State or its agents" (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)). Against this background, the second question presented is:

In the context of a 42 U.S.C. § 1983 claim by a civil rights Petitioner of joint action (excessive force) by a private Defendant and state actors (police), was it plain error for the trial court to give the following jury instruction: "Plaintiff must prove by a preponderance of the evidence that the [private] Defendant exercised a power possessed by virtue of state law and was clothed with the authority of state law"?

3. The third question presented is:

Was it plain error for the trial court to give written copies of the jury instructions to the jury in this matter?

PARTIES

The Petitioner is as follows: Lawrence Rosano. The Petitioner was the Plaintiff in the district court and appellant in the court of appeals.

The Respondents were Defendants in the district court and Appellees in the Court of Appeals: Adelphi University, Joseph Crafa, Nicholas Manobianco, Chief of Security at Adelphi University and the Incorporated Village of Garden City (Garden City Police).

Numerous other Defendants were dismissed from the case pre-trial in the district court and were not Appellees in the Court of Appeals. The dismissed parties who did not take part in the appeal were: The County of Nassau, Nassau County Police Department, Officer Ted Sigwart, Officer Wayne Vogel, Officer K. Jackson, Officer G. Becket, Officer Schroeder, Sgt. Sullivan, Capt. Ginhardt, Officer Di Paulo, Officer Thorn, Officer Vincent Pantolillo, Officer Fitzpatrick, Board, Nassau County District Attorney Office, Denis Dillon, Margaret Hurst, Joy Watson, Judge Geoffrey O'Connell, Judge Jerome Medowar, Judge Mark Mogil, Nassau County District Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The unpublished post-trial decisions of the district court denying a new trial are found in Appendix D (A-16 to A-21) and Appendix E (A-22 to A-29). The unpublished decision of the Court of Appeals is found in Appendix A (A-1 to A-6). The Court of Appeals issued its decision on November 25, 1996. A motion for rehearing and suggestion for rehearing in banc was made by the Petitioner and was denied on February 14, 1997 (Appendix B, A-7 to A-8).

JURISDICTION

A trial to the jury was held on December 13, 1993, through December 16, 1993, ending in a verdict for the Respondent.

Motions for new trial were made by Petitioner with decisions being issued on June 28, 1994 (Appendix D, A-16 to A-21), and April 5, 1995 (Appendix E, A-22 to A-29), denying the Petitioner's motion for a new trial. The Court of Appeals issued its decision (A-1 to A-6) on November 25, 1996, affirming the district court, and denied a Petition for Rehearing on February 14, 1997 (A-7 to A-8). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioner is an individual personally and morally opposed to abortion, who was falsely arrested and subjected to excessive force on numerous occasions for engaging in his right to speak freely at Adelphi University. He was arrested by the Respondent Garden City Police in cooperation with Respondent Adelphi University and its Dean of Students,

Respondent Joseph Crafa and its Chief of Security, Respondent Nicholas Manobianco. The gravamen of the Petitioner's civil rights claim was a joint action conspiracy under 42 U.S.C. § 1983 between the private actors (Adelphi University, Joseph Crafa, and its Chief of Security, Nicholas Manobianco) and the Garden City Police consisting of the use of excessive force during the arrest, including beating up and injuring the Petitioner on several occasions.

For the jury, the crux of the case was whether or not they would believe the civil rights Petitioner's version of events or the Respondents' denials. The Petitioner himself was the sole witness for Petitioner's case. The trial court in response to a motion in limine instructed the Respondents to make no reference to the Petitioner's unrelated misdemeanor arrest and incarceration, *which took place subsequent to the 1986-1988 events in question* and which did not involve a felony or a *crimen falsi* misdemeanor.

Despite the court's ruling regarding the improper and prejudicial nature of any reference to the Petitioner's *subsequent* misdemeanor arrest and incarceration on unrelated matters, one of the defense attorneys asked one of the Respondent's witnesses whether or not he was aware that the Petitioner had made similar claims of brutality against correctional officers. The civil rights Petitioner's counsel objected and the court struck the question from the record, but issued no cautionary instruction to the jury (Appendix F, A-30 to A-32). By referencing in the question not only the unrelated prior arrest and incarceration, but the Petitioner's litigiousness, the clear damage was already done impugning the moral character of the Petitioner in violation of the trial judge's prior ruling. As Justice Jackson stated so well in

Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790, 799 (1949) (concurring):

> The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, 68 S.Ct. 248, 257, 92 L.Ed. 154, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54.

Although asked by Petitioner's counsel, the district court failed to issue at the time of the error any cautionary instructions to the jury regarding this extremely prejudicial matter (Appendix F, A-32).

Furthermore, it was plain error for the trial court to issue a statement in its jury instructions that for a private actor to be found liable of a civil conspiracy with a state actor for purposes of 42 U.S.C. § 1983, that the private "Defendant [must have] exercised a power possessed by virtue of state law and was clothed with the authority of state law" (Appendix G, A-39). This instruction, while possibly appropriate for a suit solely against a state actor, was improper for a case based on a private actor being in a joint action conspiracy with police state actors for purposes of an excessive force claim.

To make matters worse, a copy of these improper jury instructions were given to the jury. This ground was raised in a post-trial motion of the Petitioner as a basis for a new trial and was denied by the trial court (Appendix D, A-18 to A-19) and affirmed on appeal by the Second Circuit (Appendix at A-6). As will be noted in the section entitled, "Reasons for Granting the Writ", a disturbing trend has developed in the lower courts

of the United States whereby giving written copies of jury instructions is becoming common, which of course can lead, as Wright & Miller suggest in their Federal Practice and Procedure Section 2555 (1991), to the potential danger where juries take instructions out of context, which appears to have been done in this case. The improper statement just mentioned regarding a private actor clearly could have been taken out of context by the jury and that is a further reason not to have given them written copies of the jury instructions.

STATEMENT OF FACTS

The gravamen of the Petitioner's claims was summarized by the district court when it rejected the defense motion for summary judgment as follows:

> Plaintiff was deposed for several days. The testimony that he provided forms the evidentiary basis for plaintiff's opposition to defendants' motion. *Plaintiff testified that, on May 1, 1986, defendant Manobianco punched him in the nose with his fist, causing plaintiff to bleed from his nose*; he apparently contends that the *Garden City Police failed to take any action* in response to his claim that excessive force was used by Mr. Manobianco. (Rosano Tr. pp. 722, 851). Plaintiff also testified that a captain of the Garden City Police took a picture of the blood flowing from Mr. Rosano's nose and informed plaintiff that he would give the photograph to plaintiff for proof of his condition but failed to do so. (Rosano Tr. p. 710). Plaintiff additionally testified that, *on August 26, 1986, four Adelphi security guards,*

including Mr. Manobianco, beat him severely. (Rosano Tr. pp. 757-764). He maintains that despite his battered condition, *when the Garden City Police arrived they twisted his arms and did not take plaintiff to a hospital.* After being released by the Garden City Police, plaintiff claims that he brought himself to the emergency room of Franklin General Hospital. (Rosano Tr. pp. 766, 770, 779). *Last, plaintiff testified that on May 3, 1987, he was approached in the Adelphi cafeteria by four or five members of the Garden City Police Department, and that they may have been accompanied by an Adelphi security employee.* He claims that he was *placed in a hammerlock* hold by one of the police officers "and lifted up very forcefully so my head was pointed down to the stone floor," giving plaintiff "*excruciating pain in my shoulder and my neck area.*" (Rosano Tr. pp. 868-870, 879-882. . . . *Plaintiff has testified that the Garden City Police showed indifference to his alleged beaten condition, inflicted by members of a private security force employed by an academic institution, by failing to investigate his claims of excessive force and by failing, in at least one instance, to take him to a hospital for treatment.* . . . Plaintiff has also testified that *the police failed to make photographic evidence available to him* which would have buttressed any claims that he might have had against Adelphi. Last, there is some evidence that *when plaintiff was allegedly*

> *beaten by the police in the cafeteria, this was in the presence of a member of the Adelphi security force.* The repeated nature of these incidents, and the alleged beating of plaintiff by the Garden City Police in defendant's presence, constitutes sufficient evidence from which a trier of fact might reasonably infer a concerted action (emphasis added).
>
> Memorandum and Order dated March 22, 1993, Appendix C at A-12 to A-14 (emphasis added).

REASONS FOR GRANTING THE WRIT

I. The admittedly improper and highly prejudicial question regarding the civil rights Petitioner's past misdemeanor criminal conviction, incarceration and past litigiousness not only violated the trial judge's specific pre-trial order not to attempt to introduce such evidence, but so improperly tainted the jury trial that a new trial was required in accordance with *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

The dispute over the improper question was described by the district judge in his post-trial memorandum denying the motion for new trial as follows:

> Plaintiff alleged violations under 42 U.S.C. § 1983 against the remaining defendants. He claimed that defendant, Nicholas Manobianco, then-Chief of the Adelphi University ("Adelphi") security force, conspired with members of the Village of Garden City Police

Department ("Garden City") to use excessive force upon the plaintiff when the plaintiff was arrested for trespass at Adelphi University. The case was tried to a jury in December 1993. During that proceeding, the Court dismissed plaintiff's claims against defendants Adelphi and Garden City. On December 16, 1993, the jury returned a verdict in favor of the remaining defendant, Nicholas Manobianco. . . . In his only remaining claim for post-trial relief, plaintiff argues that the attorney for Garden City violated an instruction given by the Court that plaintiff's recent incarceration was not to be mentioned during trial. During her cross-examination of Dr. D'Alessandro, plaintiff's psychologist, counsel for Garden City asked the witness the following question:

> Did [Rosano] ever tell you that sometime prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and down on by correctional officers in East Meadow?

Trial Transcript at 497 ("Tr.") [Appendix F, A-30]. Plaintiff's counsel immediately objected to the question and a sidebar conference ensued. Counsel for Garden City argued that the fact that plaintiff "told other people that he has been assaulted by other police officers in other police

departments in the same exact manner, that the correctional officers in East Meadow also put his ankles together," was relevant to impeach plaintiff's credibility. *Id.* Because the Court previously ruled that plaintiff's incarceration subsequent to the events that formed the basis for the claims being tried was not admissible, the Court struck counsel's question from the record. *Id.* at 498 [Appendix F, A-32]. The Court permitted counsel for Garden City to ask the question in a form that did not reveal that plaintiff had been incarcerated. Counsel rephrased the question to the witness as follows:

> At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in — had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

Id. at 498-99 [Appendix F, A-32]. Plaintiff argues in his post-trial motion that counsel's questions sufficiently prejudiced the jury to warrant granting him a new trial. . . . The initial question posed by counsel for Garden City does not rise to the level of prejudice necessary to justify the granting of a new trial.

Memorandum and order dated April 5, 1995 (Appendix E at A-23 to A-26).

The district court here violated a long-standing position of this Court and lower federal courts that when credibility is a central issue, especially in a police brutality case where the civil rights Petitioner is his sole witness, improper questioning or evidence that a litigant has a non-felony criminal record (which is not *crimen falsi*) and has made prior claims (litigiousness) tends to shift the jury's focus from the worthiness of the litigant's claim to the moral worth of the litigant himself, especially when, as here, the incarceration and litigiousness occurred *after* the incidents that the plaintiff is complaining of in his lawsuit. What is particularly egregious here is that defense counsel violated the court's pre-trial instructions *not* to question in this area. Clearly, as can be seen from the colloquy during the side bar and subsequent "sanitized" question, the genie has clearly been let out of the bottle here, i.e., the idea has been planted in the mind of the jury that the Petitioner was incarcerated and had made prior claims - litigiousness - and any attempt to minimize that, particularly in the absence of a cautionary instruction, is futile. As Justice Jackson said so well:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, 68 S.Ct. 248, 257, 92 L.Ed. 154, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54." *Krulewitch*, 336 U.S. at 453, 69 S.Ct. at 723 (concurring).

The improper question and its sanitized version clearly shifted the focus of the jury from the Petitioner's claim of police brutality to his *subsequent* past criminal record and

litigiousness. As is in the case of *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), this Court has traditionally held that the improper question or introduction of evidence of a defendant's prior non-felony criminal record can constitute prejudicial error beyond the capacity of cautionary instructions to cure.

Here, there were no cautionary instructions, despite the request of Petitioner's counsel, although the question was struck from the record (Appendix F, A-32). The idea was planted in the jury's mind of past criminal record, incarceration and litigiousness and no attempt was even made by the trial court to instruct the jury not to consider it *at the time the error was made*, despite requests by Petitioner's counsel. Therefore, the error was not harmless. Clearly, this question and the resulting impression to the jury that the Respondent was a criminal who had been incarcerated and had made prior claims was not, "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991).

As has been said by the Second Circuit itself, "One indicator of the evidence as degree of importance is whether or not the evidence bears on an issue that is plainly critical to the jury's decision." *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d. Cir. 1996). The trial judge here had already ruled pre-trial that any evidence of Petitioner's unrelated post-event misdemeanor conviction and incarceration was wholly improper and would not be allowed (Appendix E, A-24 n.3). However, the trial court failed to uphold its earlier correct ruling when it failed to grant a new trial when the defense counsel transgressed this area.

This Court knows well that the gravamen of any claim of excessive force is the credibility of the civil rights Petitioner, especially when the Petitioner has no other witnesses to the events. Here, the Petitioner's credibility was unjustly compromised by the double improper suggestion that he had been incarcerated and was litigious. This suggestion was so prejudicial that it tainted the jury process and made the jury focus on the moral worth of the Petitioner rather than his claims. As such, a new trial is required.

As the Court of Appeals has said:

> The charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent. See McCormick on Evidence Sec. 196 at 578-81 (3d ed. 1984); 3A J. Wigmore, Evidence Secs. 963, 981 (Chadbourn rev. 1970). . . . [A plaintiff's] litigiousness may have some slight probative value, but that value is outweighed by the substantial danger of jury bias against the chronic litigant. The trial court has a duty to prevent exploitation of this prejudice.
>
> *Outley v. City of New York*, 837 F.2d 587, 592 (2d. Cir. 1988) (quotations and citations omitted).

The said improper question not only implicated the Petitioner's post-event unrelated non-felony criminal record and incarceration, but combined it with a charge of litigiousness.

This case is similar to the *Marshall* case where this Court said:

> The trial judge, stating that he felt there was no prejudice to the Petitioner, denied the motion for mistrial. The trial judge has a large discretion in ruling on the issue of prejudice. . . . Generalizations beyond that statement are not profitable because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the Defendant is almost certain to be as great when that evidence reaches the jury . . . not tempered by protective procedures.

Marshall, 360 U.S. at 313.

This Court should come to the same conclusion it did in the *Marshall* case when it stated, "We think a new trial should be granted." *Marshall*, 360 U.S. at 313.

II. The Jury Instructions regarding the elements required to prove a joint action conspiracy between a private Defendant and state actors (police) improperly required the civil rights Petitioner to prove that the private Defendant was clothed with state authority in violation of this Court's jurisprudence in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The civil rights Petitioner in the case at bar charged and testified that Respondent Adelphi University and its Chief of

Security, Respondent Nicholas Manobianco, were in a joint action conspiracy with the Respondent police of the Village of Garden City to have him falsely arrested and use excessive force in the arrest in violation of 42 U.S.C. § 1983. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970), this Court held that a private Defendant may be held liable as "a willful participant in joint activity with the State or its agents" (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)). In the context of a 42 U.S.C. § 1983 claim of joint action by a private Defendant and state actors, it was plain error for the trial court to give the following jury instruction: "Plaintiff must prove by a preponderance of the evidence that the [private] Defendant exercised a power possessed by virtue of state law and was clothed with the authority of state law".

This instruction improperly denies the Petitioner the due process of law and is plain error, as it requires a civil rights Petitioner to prove that a private Defendant *is* a state actor rather than *in a joint action conspiracy with* a state actor (the police), when false arrests accompanied by police brutality occur.

III. A disturbing trend is developing in the lower federal courts where judges are allowing written questions jury instructions to be given to the jury which has the danger of causing the jury to focus on particular statements out of context.

The Petitioner, in his post-trial motion for new trial, raised the ground that the jury should not have been given a copy of the court's instructions. The Second Circuit disagreed stating:

> Rosano argued in his post-trial motion, and now argues on appeal, that the district court erred in providing the jury with a written copy of its instructions for use during deliberations.
>
> (Second Circuit Summary Order, Appendix A, A-6).

While the Petitioner, "[F]ailed to object to the delivery of a written copy of the instructions at the time the copy was provided" (Second Circuit Summary Order, Appendix at A-6), it is clearly plain error for the trial court to do so. The trial court acknowledged that in Wright & Miller, Federal Practice and Procedure Section 2555 (1991), the authors suggest it is improper to give the jury a written copy of the instructions because the authors contend that juries may take a portion of the instruction out of context. This disturbing trend in the lower federal courts has been validated by the First[1], Second[2], Sixth[3], Seventh[4] and Eighth[5] Circuits. This Court must intervene to correct this improper and prejudicial practice.

---

1 *United States v. Parent*, 954 F.2d 23, 25 (1st Cir. 1992).

2 The case at bar.

3 *United States v. Blane*, 375 F.2d 249 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967).

4 *United States v. Clavey*, 565 F.2d 111 (7th Cir. 1977), *modified on other grounds*, 578 F.2d 1219 (7th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978).

5 *Stineman v. Fontbonne College*, 664 F.2d 1082 (8th Cir. 1981).

CONCLUSION

For the foregoing reasons, the Petitioner is entitled to a new trial for his civil rights claim under 42 U.S.C. § 1983 against Respondents Adelphi University, its Dean of Students, Joseph Crafa, its Chief of Security, Nicholas Manobianco, and the Incorporated Village of Garden City (Garden City Police) and prays from this Court that the judgment of the Second Circuit be vacated and reversed in a summary fashion as this Court did in *Marshall v. United States*, or that it be vacated and remanded for further proceedings after plenary consideration by this Court.

Respectfully submitted,

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Dated: New Milford, CT
May 15, 1997

APPENDICES

APPENDIX A
SUMMARY ORDER

EDNY
87-cv-876
Amon, DJ

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 25th day of November, one thousand nine hundred and ninety-six.

PRESENT: HON. WILFRED FEINBERG
HON. ROGER J. MINER
HON. FRED I. PARKER,
Circuit Judges

/Seal/Filed Nov. 25, 1996

LAWRENCE R. ROSANO,
Plaintiff-Appellant,

v.

95-6250

ADELPHI UNIVERSITY; JOSEPH CRAFA, Dean of Students of Adelphi University; NICHOLAS MANOBIANCO, Adelphi University Security; INCORPORATED VILLAGE OF GARDEN CITY; GARDEN CITY POLICE; THE COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT; OFFICER TED SIGWART, Badge No. 108, of Garden City; OFFICER WAYNE VOGEL, Badge No. 117, of Garden City; OFFICER K. JACKSON, Badge No. 150, of Garden City; OFFICER G. BECKETT, Badge No. 104, of Garden City; OFFICER SCHROEDER, Badge No. 154, of Garden City; SGT. SULLIVAN, Badge No. 33, of Garden City; CAPT. ;GINHARDT, of Garden City; OFFICER DIPAULO, Badge No. 37, of Garden City; OFFICER THORN, Badge No. 106, of Garden City; OFFICER VINCENT PANTOLILLO, Badge No. 139, of Garden City; OFFICER FITZPATRICK, Badge No. 32, of Garden City; BOARD; NASSAU COUNTY DISTRICT ATTORNEY OFFICE; DENIS DILLON, District Attorney of Nassau County; MARGARET HURST, Assist. District Attorney of Nassau County; JOY WATSON, Assist. District Attorney of Nassau County; JUDGE GEOFFREY O'CONNELL, of the Nassau County District Court; JUDGE JEROME MEDOWAR, of the Nassau County District Court; JUDGE MARK MOGIL, of the Nassau County District Court; NASSAU COUNTY DISTRICT COURT, First District,

Defendant-Appellees

Henry Wilson; Garland Mercer; Richard Marston; Glen Ursher; Andrew Davis; Edwin Miller and Thomas Cox,
Defendants.

APPEARING FOR APPELLANT:

Lawrence R. Rosano, *pro se,*
Elmont, NY.

APPEARING FOR APPELLEES
ADELPHI UNIVERSITY, JOSEPH CRAFA,
AND NICHOLAS MANOBIANCO:

Edward M. Fogarty, Fogarty & Fogarty,
Mineola, NY.

APPEARING FOR APPELLEE VILLAGE OF GARDEN CITY:

Nancy Cifone, Corrado & Cifone,
Great Neck, NY.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and hereby is AFFIRMED.

This cause came on to be heard on the transcript of record and was argued.

Plaintiff-appellant Lawrence R. Rosano appeals *pro se* from a judgment entered in the United States District Court for the Eastern District of New York (Amon, J.) after a jury trial, and from an order denying a motion for a new trial.

Rosano at one time was employed by the United States Navy as a civilian engineer. Upon dismissal from the Navy,

Rosano brought six lawsuits against the United States, each of which was decided against him. While these suits were in the appeal process, Rosano entered a paralegal training program at defendant-appellee Adelphi University. Once his student status expired, Rosano continued using the library and word processing facilities at Adelphi in pursuit of his several legal actions before various federal courts.

In March of 1986, Rosano was detained by Adelphi security officers on a charge of harassing some Adelphi students. As a result of this charge, Rosano was issued a persona non grata letter, which prohibited him from being on Adelphi property. On seven separate occasions, Rosano was found on campus by Adelphi security officers. He was detained, removed and charged with trespass on each occasion. One of the reasons advanced by Rosano for being on campus was that he needed to use the law library to pursue federal court actions raising constitutional challenges to abortion and contraception. He subsequently was convicted on seven trespass violations.

On March 20, 1987, Rosano filed a complaint in the district court. The complaint, as twice amended thereafter, included various causes of action relating to Rosano's arrests for trespassing, including several constitutional claims and claims of a conspiracy between Adelphi security officers and the Garden City police to use excessive force in effecting four of the arrests. The original complaint named some 31 defendants. After numerous dismissal motions were granted, the list of defendants was reduced to three—Adelphi, defendant-appellee Nicholas Manobianco, who was Adelphi's Director of Safety and Security, and defendant-appellee Garden City, New York. The case went to trial on December 13, 1993. On December 15th, the district court

dismissed the action with respect to Adelphi and Garden City. On December 16th, the jury returned a verdict for Manobianco. Rosano moved for a new trial, and the district court denied the motion. On appeal, Rosano advances a number of arguments.

Rosano claims that he should have been granted a new trial because Garden City's attorney asked an improper question relating to his incarceration. We disagree. Although an improper question was asked, the district court minimized the prejudicial effect of the question by immediately ordering the question struck from the record. Thus, the challenged statement does not provide a basis for disturbing the jury verdict. *See Smith v. Lightning Bolt Prod., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988).

Rosano also contends that the district court erred in holding that he had forfeited his challenge to the acting under color of state law jury instruction. We have held that "[a]bsent objection, an error [in the jury instructions] may be pursued on appeal only if it is 'plain error' that may result in a miscarriage of justice, or in 'obvious instances of . . . misapplied law.' " *Metromedia v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992) (quotation omitted), *cert. denied*, 508 U.S. 952 (1993). In the present case, there was no plain error or misapplication of law. In fact, the jury instruction set forth the proper standard for finding liability on the part of a private actor acting in concert with state officials. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150-52 (1970). Therefore, we reject this claim.

With respect to Rosano's constitutional claims against the Adelphi defendants, the district court properly held that these claims, except as to conspiracy, must fail because the defendants are not state actors. *See e.g., Flagg Bros., Inc. v.*

Brooks, 436 U.S. 149, 156-57 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). As to the conspiracy claims, private parties cannot be liable under 42 U.S.C. § 1983 unless they conspire with a person acting under color of state law to deprive the plaintiff of a constitutional right. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996). However, Rosano had no constitutional right to be on the property of Adelphi, a private university. Accordingly, the district court prior to trial properly dismissed all of Rosano's claims, except the claim that the Adelphi defendants conspired with state officials to use excessive force against him.

Rosano argued in his post-trial motion, and now argues on appeal, that the district court erred in providing the jury with a written copy of its instructions for use during deliberations. Our examination of the record reveals that this argument was not raised until the motion for a new trial was made, nearly one month after the jury reached its verdict. Because Rosano failed to object to the delivery of a written copy of the instructions at the time the copy was provided, we review for plain error. *See United States v. Delano*, 55 F.3d 720, 732 (2d Cir. 1995). We think that the delivery of written text to the jury was appropriate in this case and that Rosano "cannot demonstrate any error, let alone surmount the higher plain error standard." *Id.*

We have considered all the other arguments advanced by Rosano and find no merit in any of them.

/Signature/
HON. WILFRED FEINBERG, HON. ROGER J. MINER,
HON. FRED I. PARKER
Circuit Judges.

APPENDIX B
DENIAL OF REHEARING IN BANC
DATED FEBRUARY 14, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10097

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourteenth day of February one thousand nine hundred and ninety-seven.

/Seal/
Filed Feb. 14, 1997
Dkt No: 95-6250

Rosano

Appellant

v

Adelphi University

Appellee

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Lawrence R. Rosano,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
George Lange III, Clerk

By:
/signature/
Beth J. Meador,
Administrative Attorney

o ccc
bancdn_frm

APPENDIX C
MEMORANDUM AND ORDER DATED 3/22/93

United States District Court

EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
CV 87-0876

LAWRENCE ROSANO,

Plaintiff.

- against -

ADELPHI UNIVERSITY, et al.,

Defendants.

AMON, UNITED STATES DISTRICT JUDGE

Introduction

This Court has received Magistrate Judge David F. Jordan's Report and Recommendation in the above case. 28 U.S.C. § 636 (b) (1). In part II of the Report and Recommendation, Magistrate Judge Jordan recommends denial of the County of Nassau's motion for summary judgment of the cross-claim of the Village of Garden City. The report concludes that the County of Nassau's motion is moot because this Court, by Order dated May 15, 1992, dismissed the Village of Garden City's cross-claim. Having received no objections, the Court hereby adopts this portion of the Report and Recommendation as the opinion of this Court.

In part III of the Report and Recommendation, Magistrate Judge Jordan recommends dismissal of the defendants Nassau

County Police Department, Nassau County District Attorney's Office and eleven Village of Garden City policemen. Having received no objections, and having conducted a *de novo* review of the record, the Court hereby adopts this portion of the Report and Recommendation as the opinion of this Court.

The Court has received objections to part I of the Report and Recommendation, in which Magistrate Judge Jordan recommends denial of defendants Adelphi University and Nicholas Manobianco's motion for summary judgment. Having conducted a *de novo* review of the record, the Court reaches the same conclusion as did Magistrate Judge Jordan but for different reasons.

Magistrate Judge Jordan construed defendants' motion to argue that summary judgment should be granted because plaintiff had presented no direct evidence of a conspiracy. Magistrate Judge Jordan recommended that defendants' motion be denied because circumstantial evidence can be offered to prove concerted action and direct evidence is not required. He further concluded that defendants had not fairly raised the issue of whether plaintiff had presented sufficient circumstantial evidence in order to defeat summary judgment. The Court respectfully disagrees with this latter conclusion and finds that defendants did raise the issue of the adequacy of the entirety of plaintiff's evidence. Because the evidence that plaintiff has presented meets the threshold requirements, defendants' motion for summary judgment is denied.

Background

Plaintiff's claims stem from his seven arrests, and subsequent conviction, for criminal trespass for entering the Adelphi campus in violation of the terms of a *persona non*

grata letter that had been issued to him by defendant Adelphi University. By Memorandum and Order dated August 4, 1988, the Honorable Reena Raggi dismissed all of plaintiff's claims against all of the named defendants, with the following exception. She permitted plaintiff to amend his complaint to state a claim against Adelphi and Mr. Manobianco, a member of the Adelphi security force, "charging a conspiracy among Adelphi Security personnel and Garden City Police to use excessive force in effecting his arrests." August 4, 1988 Memorandum and Order at 12.

Plaintiff's Amended Complaint exceeded the boundaries delineated by Judge Raggi and so, by Order dated June 27, 1990, Judge Raggi adopted Magistrate Judge Jordan's Report and Recommendation which recommended dismissal of those claims presented in the Amended Complaint which had been dismissed earlier in Judge Raggi's August 4, 1988 Memorandum and Order. Plaintiff's only remaining claim is against Adelphi and Mr. Manobianco which alleges that they conspired with the Garden City Police to use excessive force against the plaintiff in violation of 42 U.S.C. § 1983. Defendants have now moved for summary judgment against that claim.

Discussion

Defendants seek summary judgment, contending that plaintiff has presented no evidence that defendants had an agreement with the Garden City Police to use excessive force on plaintiff. In order to prevail on their motion, defendants must demonstrate that there is no issue as to any material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This Court must view the evidence in the light

most favorable to the plaintiff, the nonmoving party. *Adickes v. S.H. Kress,* 398 U.S. 144, 157 (1970).

Application of this standard to this case requires a review of the evidence which plaintiff has submitted in support of his conspiracy allegations. Plaintiff was deposed for several days. The testimony that he provided forms the evidentiary basis for plaintiff's opposition to defendants' motion. Plaintiff testified that, on May 1, 1986, defendant Manobianco punched him in the nose with his fist, causing plaintiff to bleed from his nose; he apparently contends that the Garden City Police failed to take any action in response to his claim that excessive force was used by Mr. Manobianco. (Rosano Tr. pp. 722, 851). Plaintiff also testified that a captain of the Garden City Police took a picture of the blood flowing from Mr. Rosano's nose and informed plaintiff that he would give the photograph to plaintiff for proof of his condition but failed to do so. (Rosano Tr. p. 710).

Plaintiff additionally testified that, on August 26, 1986, four Adelphi security guards, including Mr. Manobianco, beat him severely. (Rosano Tr. pp. 757-764). He maintains that despite his battered condition, when the Garden City Police arrived they twisted his arms and did not take plaintiff to a hospital. After being released by the Garden City Police, plaintiff claims that he brought himself to the emergency room of Franklin General Hospital. (Rosano Tr. pp. 766, 770, 779). Last, plaintiff testified that on May 3, 1987, he was approached in the Adelphi cafeteria by four or five members of the Garden City Police Department, and that they may have been accompanied by an Adelphi security employee. He claims that he was placed in a hammerlock hold by one of the police officers "and lifted up very forcefully so my head was pointed down to the stone floor," giving plaintiff

"excruciating pain in my shoulder and my neck area," (Rosano Tr. pp. 868-870, 879-882).

This evidence is sufficient, although barely, to defeat defendants' motion. Defendants rely on *San Filippo v. U.S. Trust Co. Of New York, Inc.*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985), as support for their position that plaintiff's evidence fails to make out a conspiracy. In that case, the Second Circuit, reversing the district court, granted defendants' motion to dismiss plaintiff's § 1983 claim alleging a conspiracy between an Assistant District Attorney ("ADA") and the defendant to present false testimony against plaintiff. The Second Circuit noted that plaintiff's conspiracy allegations were "completely unsubstantiated," *Id.* At 256, and therefore "insufficient to state a valid claim for relief under § 1983, or, in the alternative, to defeat defendants' motion for summary judgment." *Id.* The evidence which plaintiff had presented in support of his claim merely showed that the ADA had met with the defendants prior to their grand jury testimony, an action entirely consistent with the innocent and routine preparation of evidence, *Id.* As a result, plaintiff failed to present "one shred of evidence in support of his conclusory assertion of conspiracy." *Id.*

In contrast to the situation presented in *San Filippo,* here plaintiff has sufficiently supported his claim by presenting facts from which a fact-finder might rationally infer the existence of a conspiracy. Plaintiff has testified that the Garden City Police showed indifference to his alleged beaten condition, inflicted by members of a private security force employed by an academic institution, by failing to investigate his claims of excessive force and by failing, in at least one instance, to take him to a hospital for treatment. *See e.g.*

Firman v. Abreu, 691 F. Supp. 811, 813-14 (S.D.N.Y. 1988) (denying summary judgment alleging conspiracy to bring criminal charges maliciously and without probable cause where facts existed from which fact finder could make rational inference of conspiracy).

Plaintiff has also testified that the police failed to make photographic evidence available to him which would have buttressed any claims that he might have had against Adelphi. Last, there is some evidence that when plaintiff was allegedly beaten by the police in the cafeteria, this was in the presence of a member of the Adelphi security force. The repeated nature of these incidents, and the alleged beating of plaintiff by the Garden City Police in defendant's presence, constitutes sufficient evidence from which a trier of fact might reasonably infer a concerted action. *See e.g. Adickes v. S. H. Kress and Co.*, 398 U.S. 160, 90 S.Ct. 1598, 1608-09 (1970) (possibility that police officer who arrested plaintiff for vagrancy was also present in store which discriminated against plaintiff, and possibility that the same police officer had an understanding with the store not to serve plaintiff, held sufficient to defeat defendant's motion for summary judgment); *Dwares v. The City of New York*, No. 92-7266, 1993 U.S. App. LEXIS 2004, __ F. 2d __ (2d Cir. February 5, 1993) (allegations that defendant officers told "skinheads" that officers would permit "skinheads" to assault demonstrators, that a "skinhead" reported this permission to a reporter, that a demonstrator was assaulted by "skinheads" in the presence of an officer, and that officers did not interfere with the assault or arrest the "skinheads," held to "easily" meet § 1983 conspiracy pleading requirements. *Id.* at *16). Moreover, while in *San Filippo* plaintiff had not presented any evidence that the testimony in furtherance of the alleged conspiracy which defendants

ultimately gave was false, id., here evidence exists that the force used against plaintiff was excessive. (*See e.g.* Rosano Tr. p. 772).

Conclusion

For the reasons set forth above, the Court adopts Part II and Part III of Magistrate Judge Jordan's Report and Recommendation. The Court does not adopt the reasoning of Part I of that Report and Recommendation insofar as it finds that defendants did not raise the issue of the sufficiency of plaintiff's evidence, although the Court reaches the same conclusion that was reached in the Report and Recommendation, and accordingly denies defendants' motion for summary judgment.

SO ORDERED.

Dated: Brooklyn, New York
March 22, 1993

/Signature/
Carol Bagley Amon
United States District Judge

APPENDIX D
MEMORANDUM AND ORDER DATED 6/28/93

United States District Court

EASTERN DISTRICT OF NEW YORK
MEMORANDUM AND ORDER
87 CV 0876

LAWRENCE ROSANO,

Plaintiff,

-against-

ADELPHI UNIVERSITY, and
NICHOLAS MANOBIANCO,

Defendants,

-against-

VILLAGE OF GARDEN CITY,

Third-party defendant.

AMON, U.S. DISTRICT JUDGE

Introduction

Plaintiff moves, pursuant to rule 59 (a) (1), for post-trial relief. Defendants Adelphi University and Nicholas Manobianco, together with third-party defendant Village of Garden City ("defendants"), oppose the motion. The motion is denied for the reasons that follow, with the exception of one issue which cannot yet be resolved.

Background

This action is what remains of a suit initiated seven years ago against at least thirty defendants. Plaintiff alleged

violations under 42 U.S.C. § 1983 against the remaining defendants. He claimed that defendant, Nicholas Manobianco, then-Chief of the Adelphi University ("Adelphi") security force, conspired with members of the Village of Garden City Police Department ("Garden City") to use excessive force upon the plaintiff when the plaintiff was arrested for trespass at Adelphi University. The case was tried to a jury in December 1993. During that proceeding, the Court dismissed defendants Adelphi and "Garden City". On December 16, 1994, the jury returned a verdict in favor of the remaining defendant, Nicholas Manobianco.

The plaintiff moves for a new trial on several grounds. He alleges that the Court erred in allowing the jury to take a copy of its instructions into the jury room during deliberations. He also argues that the jury instructions were "weighted unconstitutionally for defendants, and against plaintiff." Pl.'s Rule 59 Mem. at 1. Next, the plaintiff suggests that a question posed by third-party defendant Garden City was prejudicial. Plaintiff also "seeks to vacate the prior, non-final orders of Judge Raggi dismissing plaintiff's claims of Justification, defending Unborn Human Life, and Justification, exercising his Federal First Amendment Right, against Adelphi University and the Garden City Police." *Id.* at 1-2. Finally, plaintiff objects to the dismissal of defendants Adelphi and Garden City.

Discussion

Timeliness

Defendants Adelphi and Manobianco argue that plaintiff's motion is untimely. Judgment was entered in this case on December 21, 1993. Excluding week-ends and legal holidays,

see Fed. R. Civ. P. 6, plaintiff's motion had to be filed on or before January 6, 1994. Because the motion was filed on January 6, 1994, it is timely.

Jury Instruction

Plaintiff argues that the jury should not have been given a copy of the Court's instructions. He apparently theorizes that the parties were deprived of an opportunity to participate in answering any questions the jury might have had. Pl.'s Rule 59 Mem. at 1. However, the cases upon which plaintiff relies deal with situations in which trial courts mis-handled notes from a deliberating jury. *See United States v. Parent,* 954 F.2d 23, 25 (1st Cir. 1992); *United States v Maraj,* 947 F.2d 520, 525 (1st Cir. 1991); *Jimenez v. Heyliger,* 792 F. Supp. 910 (D.P.R. 1992).

These cases do not stand for the proposition that it is improper to give a jury a copy of long and often complicated legal instructions. Indeed, in *Parent,* the First Circuit noted that "[a} judge may, but need not, give the jury a written copy of the complete charge at the outset of deliberations." *Parent,* 954 F.2d at 24, n. 1. Other circuits agree, *see, e.g., Stineman v. Fontbonne College,* 664F.2d 1082 (8th Cir. 1981); *United States v. Clavev,* 565 F.2d 111 (7th Cir. 1977), *modified on other grounds,* 578 F.2d 1219 (7th Cir. 1978), *cert. denied,* 439 U.S. 954 (1978); *United States v. Blane,* 375 F.2d 249 (6th Cir.), *cert. denied,* 389 U.S. 835 (1967), as do commentators, *see, e.g.,* Wright & Miller, Federal Practice and Procedure

§ 2555 (1971).[1] Giving the instructions to the jury for use in their deliberations was not error.

Jury Instructions

The plaintiff urges that the Court's "instructions should have been structured to follow the underlying principle of considering evidence for decision on the basis of 'One Man's Word Against Another's,' rather than putting more weight to quantity over quality" (emphasis original). Pl.'s Rule 59 Mem. at 5. This argument is based on plaintiff's perception that the defendants' witnesses were interested in the outcome of the trial because they were employed by the defendants. Therefore, Rosano theorizes, they were likely to lie. Consequently, in his view, the jury should have been instructed to focus on the quality of the testimony, rather than on the sheer number of witnesses. *Id.*

Plaintiff, who was represented by counsel at trial, did not object to the Court's instruction on credibility. His argument is therefore not preserved. Fed. R. Civ. P. 51. Furthermore, his contention is meritless. The Court gave an instruction on credibility which clearly instructed the jury that it was to determine, based on its members' judgment of each witness, the weight to which the testimony was entitled. Moreover, the Court gave an interested witness instruction. *See* Jury

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1 Plaintiff argues that Wright & Miller actually support his viewpoint because the authors note that juries may take a portion of the instruction out of context. Pl.'s Reply Mem. to Garden City, Suppl. 2. Rosano reads the commentators accurately, but ignores that the decision is one committed to the court's discretion. Wright & Miller, Federal Practice and Procedure § 2555 (1971).

Instruction at 5-7. The jury instruction was not incorrect; in any event, the argument is not preserved.

Prejudicial Question

Plaintiff also claims that the attorney for Garden City violated an instruction given by the Court. *See* Pl.'s Rule 59 Mem. at 6. Rosano argues that the Court directed defendants not to divulge that plaintiff had been incarcerated; plaintiff argues that the attorney for Garden City violated this instruction. Plaintiff has neither ordered the transcript nor provided the Court with specific references to citations. Resolution of this issue requires that the Court review the transcript. Plaintiff is directed to provide the transcript and specific citations in a submission to be made no later than July 15, 1994.

Justification Defense

Plaintiff asks the Court to reconsider a decision by United States District Judge Reena Raggi, to whom this case was previously assigned. Rosano suggests that the Court should, in its discretion, reconsider a decision made by Judge Raggi which, apparently, dismissed the affirmative defense of "justification." The Court declines to revisit issues resolved by Judge Raggi, and has, therefore, not considered the related arguments set forth in Plaintiff's Rule 59 Memorandum. Plaintiff is advised that the Court will not consider any additional submissions which raise the justification defenses.

Dismissal of Defendants Adelphi and Garden City

Finally, plaintiff complains about the court's dismissal of defendants Adelphi University and the Village of Garden City. As defendants point out, and plaintiff concedes, his

attorney not only did not object to the dismissals, he *agreed with* the Court's action. In any event, and for the reasons stated on the record, the dismissals were proper.

Lack of Context

Plaintiff claims, in his Reply Memorandum, that the jury must have been confused because it heard no testimony as to why plaintiff repeatedly returned to the campus of defendant Adelphi. Reply Mem. at 4. Plaintiff was, as mentioned earlier, represented by capable counsel. The jury heard as much background testimony as was permitted by the Federal Rules of Evidence and deemed appropriate by plaintiff's attorneys. No new trial is warranted on the ground that the jury performed its function in a vacuum.

Conclusion

For the stated reasons, the motion is denied on all grounds, except that decision is reserved as to the allegedly prejudicial question. Any submission by plaintiff is to be filed by July 15, 1994 and is to address only that point. Defendants are to seek leave of court before submitting any response.

SO ORDERED

Dated: Brooklyn, New York
June 28, 1994

/Signature/
Carol Bagley Amon
United States District Judge

APPENDIX E
MEMORANDUM AND ORDER DATED 4/5/95

United States District Court

EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
87-CV-0876 (CBA)

Stamp: PLEAD X

LAWRENCE ROSANO,

Plaintiff,

-against-

ADELPHI UNIVERSITY, and
NICHOLAS MANOBIANCO,

Defendants,

-against-

VILLAGE OF GARDEN CITY,

Third-party defendant.

AMON, U.S. DISTRICT JUDGE

Introduction

On June 28, 1994, this Court denied plaintiff's motion, pursuant to Rule 59(a) (1), for post-trial relief based upon

various grounds.[1] The Court, however, reserved decision on plaintiff's motion for a new trial based upon his claim that a question posed by counsel for third-party defendant Garden City was prejudicial. The Court ordered the plaintiff to provide the transcript and the specific citation to the alleged prejudicial question.[2] For the reasons that follow, plaintiff's motion for a new trial based upon this final unresolved claim is denied.

Background

This action is what remains of a suit initiated eight years ago against at least thirty defendants. Plaintiff alleged violations under 42 U.S.C. § 1983 against the remaining defendants. He claimed that defendant, Nicholas Manobianco, then-Chief of the Adelphi University

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1 The plaintiff moved for a new trial on several grounds. He alleged that the Court erred in allowing the jury to take a copy of its instructions into the jury room during deliberations. He also argued that the jury instructions were "weighted unconstitutionally for defendants, and against plaintiff." Pl.'s Rule 59 Mem. at 1. Plaintiff also sought "to vacate the prior, non-final orders of Judge Raggi dismissing plaintiff's claims of Justification, defending Unborn Human Life, and Justification, exercising his Federal First Amendment Right, against Adelphi University and the Garden City Police." *Id.* at 1-2. The Court declined to reconsider the issue resolved by Judge Raggi. Finally, plaintiff objected to the dismissal of defendants Adelphi and Garden City.

2 The Court also granted defendants Adelphi University and Nicholas Manobianco, together with third-party defendant Village of Garden City ("defendants"), permission to file a response to plaintiff's further submission. Plaintiff was allowed to file a reply to defendants' response.

("Adelphi") security force, conspired with members of the Village of Garden City Police Department ("Garden City") to use excessive force upon the plaintiff when the plaintiff was arrested for trespass at Adelphi University. The case was tried to a jury in December 1993. During that proceeding, the Court dismissed plaintiff's claims against defendants Adelphi and Garden City. On December 16, 1993, the jury returned a verdict in favor of the remaining defendant, Nicholas Manobianco.

Discussion

In his only remaining claim for post-trial relief, plaintiff argues that the attorney for Garden City violated an instruction given by the Court that plaintiff's recent incarceration was not to be mentioned during trial.[3] During her cross-examination of Dr. D'Alessandro, plaintiff's psychologist, counsel for Garden City asked the witness the following question:

> Did [Rosano] ever tell you that sometime prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and

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3 Prior to the beginning of trial, the Court directed counsel that they were not to mention plaintiff's subsequent conviction during the trial. Transcript Prior to Jury Selection at 6. The Court further clarified its ruling by stating that the subsequent conviction it was referring to was "the one that he was just incarcerated for." *Id.* at 16-17. Plaintiff was incarcerated for ninety-six days in 1993. *See* Plaintiff's Rule 59 Motion Supplement of August 1, 1994.

> down on by correctional officers in East Meadow?

Trial Transcript at 497 ("Tr."). Plaintiff's counsel immediately objected to the question and a sidebar conference ensued. Counsel for Garden City argued that the fact that plaintiff "told other people that he has been assaulted by other police officers in other police departments in the same exact manner, that the correctional officers in East Meadow also put his ankles together," was relevant to impeach plaintiff's credibility. *Id.*

Because the Court previously ruled that plaintiff's incarceration subsequent to the events that formed the basis for the claims being tried was not admissible, the Court struck counsel's question from the record. *Id.* at 498. The Court permitted counsel for Garden City to ask the question in a form that did not reveal that plaintiff had been incarcerated. Counsel rephrased the question to the witness as follows:

> At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in — had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

Id. at 498-99.

Plaintiff argues in his post-trial motion that counsel's questions sufficiently prejudiced the jury to warrant granting him a new trial. This Court will not grant a new trial unless it " 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Sorlucco*

v. New York City Police Dept., 971 F.2d 864, 875 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)).

The initial question posed by counsel for Garden City does not rise to the level of prejudice necessary to justify the granting of a new trial. The question was not answered by the witness and the Court promptly ordered that it should be stricken from the record. The question itself was not evidence and the jury was instructed accordingly twice by this Court, once prior to the beginning of trial and again during the Court's charge to the jury. *See* Tr. at 4, 623.[4]

In *Smith v. Lightning Bolt Productions, Inc.*, defendants moved for a new trial claiming that an improper question by plaintiff's counsel prejudiced the jury.[5] The Second Circuit affirmed the district court's denial of defendants' motion for a new trial and noted the following:

> Plainly this question was improper, but the court acted promptly to minimize any damage from it. It immediately struck the question, even before defense counsel could voice an objection, and it cautioned the jury to disregard the question.

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4 As part of its charge, the Court also instructed the jury that "[a]ny evidence ordered stricken by the Court must be entirely disregarded by you in your deliberations." Tr. at 623.

5 While cross-examining a defense witness, plaintiff's counsel asked him, "Didn't [plaintiff] tell you that Mr. Solerwitz wanted to settle this case?" *Smith*, 861 F2d at 370. The question inappropriately made reference to settlement negotiations between the parties.

> There was no further mention of the subject within the hearing of the jury.

Smith, 861 F.2d at 370. *See also Alpex Computer Corp v. Nintendo Co., Ltd.*, 1994 WL 681752 at *34 (S.D.N.Y. 1994) (plaintiff's counsel's improper reference during his opening statement to the defendants' indemnification agreement did not warrant granting a new trial where the court sustained defense counsel's objection to the reference and instructed the jury at the end of trial that counsel's argument was not evidence).

Here, the Court similarly finds that the improper question by counsel for Garden City does not warrant a new trial.[6] The question was stricken from the record in its improper form and the jury was twice instructed that statements by counsel are not evidence.

The Court also finds that counsel's question in its restated form was not improper in that it did not make any reference to plaintiff's subsequent periods of incarceration. The inquiry was also relevant. Plaintiff had described a very unusual form

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6 The Court also notes counsel's explanation that her question was not a deliberate violation of the Court's pre-trial evidentiary ruling excluding evidence of plaintiff's subsequent conviction. Counsel states in her affidavit that she understood the "preclusion referred only to the most recent incarceration and not to the incident to which [she] was referring, which occurred in February or March 1991." Schuster Affidavit of February 14, 1994 at 4.

of abuse[7] and it was relevant to his credibility that he had made an accusation of the same unusual conduct against a different group of police. The witness was carefully instructed by the Court that in responding to counsel's question he should not indicate "the circumstances of where it happened. Just if you can tell us what he told you." Tr. at 499. The witness did not refer to plaintiff's incarceration during his response.

Moreover, plaintiff's counsel did not object at trial to the question in its restated form. Absent plain error, a party's failure to object to the admission of evidence at trial precludes the party from raising the argument on appeal. *See* Fed. R. Evid. 103; *Huchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991).

Conclusion

The Court does not find that the verdict in this case was seriously erroneous. There was overwhelming evidence presented at trial that plaintiff's claims against the defendants were not credible. In addition, the Court does not find that counsel's question rises to the level of prejudice requiring a new trial.

Therefore, plaintiff's motion for a new trial based upon counsel's prejudicial question is denied. In his reply papers, submitted on January 6, 1995, plaintiff attempts to raise

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7 Plaintiff testified that while he was pinned to the ground, the security guards put his ankles together and began "jumping on [him] like a trampoline." Tr. at 69.

additional grounds for the granting of a new trial.[8] These claims are untimely and in any event are completely without merit.

SO ORDERED.

Dated: Brooklyn, New York, April 5, 1995
/Signature/Carol Bagley Amon
United States District Judge

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8 Specifically, plaintiff maintains that several Adelphi guards committed perjury at trial and that the jury instructions were prejudicial because the Court told the jury to consider all of the evidence presented. Pl.'s Reply Mem. at 18-22.

APPENDIX F
EXCERPT OF TRIAL TRANSCRIPT
DATED DECEMBER 1993

D'Alessandro/cross/Broderick

CROSS-EXAMINATION BY MS. SCHUSTER:

Q Can I see your records, doctor.
You remember meeting Mr. Rosano in the early part of 1991?

A Yes

Q Did he ever tell you that sometime prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and down on by correctional officers in East Meadow?

MR. BRODERICK: Objection, your Honor.

MR. WASHBURN: May we have a sidebar, your Honor?

MS. SCHUSTER: The plaintiff testified about that in his disposition, and it's in one of the medical reports in 1989 or 1991.

THE COURT: What's the relevance?

MS. SCHUSTER: That he has a habit, that he's told other people that he has been assaulted by other police officers in other police departments in the same exact

manner, that the correctional officers in East Meadow also put his ankles together.

THE COURT: I don't understand.

MS. SCHUSTER: It goes to show, if he told — did he tell him this or not?

MR. WASHBURN: This is a big question.

MS. SCHUSTER: On the credibility.

MR. WASHBURN: Very, very outweighed.

THE COURT: Did the question about being in jail —

MR. WASHBURN: These people are not joking.

MS. SCHUSTER: — it's an allegation—

THE COURT: How come you didn't cross-examine him about it?

MS. SCHUSTER: I just found it in the medical records, when I was looking through them.

THE COURT: If he says no, you're stuck with the answer.

MS. SCHUSTER: Okay.

THE COURT: You can't — and I'll tell them not to —

MR. WASHBURN: I'd like an instruction, your Honor.

THE COURT: I'll strike the question in its present form. You ask him whether he ever told him that police officers other than — or that police authorities other than Garden City and Adelphi did this to him.

MS. SCHUSTER: Okay.

THE COURT: I'll strike the question. Then if he says no, you're stuck with the answer, and you can't do anything else with it.

MS. SCHUSTER: Okay.

(Whereupon, the following occurred in open court.)

THE COURT: I'm striking from the record the previous question. Do you want to ask another question?

MS. SCHUSTER: Yes

BY MS. SCHUSTER:

Q At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in — had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

A Yes.

Q What did he tell you about that?

A He told me that he was —

THE COURT: Just with respect to the — actually what was done.

Q Not —

THE COURT: Not the circumstances of where it happened. Just if you can tell us what he told you.

THE WITNESS: Just that that individual had assaulted him. I do not remember the specifics.

Q Do you recall whether or not he told you that his ankles were placed together while he was on the floor, and his ankles were jumped up and down on?

A I don't recall that.

Q Do you recall he told you whether or not any other parts of his body were jumped up and down on?

A I do not recall that.

Q You do recall that he told you that such an occurrence involving a police authority other than Adelphi and Garden City?

THE COURT: With respect to what physically happened to him.

Q You do recall that he told you that something happened?

A Something happened to him, yes.

APPENDIX G
EXCERPT OF WRITTEN COPY OF JURY INSTRUCTIONS FROM TRANSCRIPT OF DECEMBER, 1993

9. Elements of § 1983 Action

In order to prove his claim, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following elements.

10. Conspiracy

a. First Element: Plaintiff must prove by a preponderance of the evidence that the defendant, Nicholas Manobianco, conspired with members of the Garden City police force to use excessive force upon the plaintiff.

Let me now instruct you on the legal definition of conspiracy. A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. The essence of a conspiracy is an agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests, is not necessarily proof of the existence of a conspiracy. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before you may find that the defendant has become a member of a conspiracy, it must be shown by a preponderance of the evidence that the conspiracy was knowingly formed, and that the defendant knowingly participated in some unlawful plan with the intent to advance or further some object or purpose of the conspiracy. To act or participate knowingly means to act or participate voluntarily and intentionally and not because of mistake, accident or other innocent reason.

b. Unlawful Purpose

Second Element: The second element that plaintiff must prove by a preponderance of the evidence is that the conspiracy had an unlawful purpose. In this case, the plaintiff contends that the purpose of the conspiracy was to subject him to excessive force during the course of the several arrests he described. The plaintiff must also prove by a preponderance of the evidence that the purpose of the conspiracy was effected, that is, that excessive force was used against him. In this case, the plaintiff contends that as to the defendant Manobianco excessive force was used in connection with his arrests on two separate occasions: May 1, 1986 and August 26, 1986.

In this regard, you are instructed as a matter of law that under the Constitution of the United States every citizen has the right not to be subjected to unreasonable force while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with due process of law. On the other hand, in making a lawful arrest a person has the right

to use such force as is necessary under the circumstances to effect the arrest. Whether or not the force used in making an arrest was unreasonable is a question to be determined by you in light of the surrounding circumstances. You must determine the degree of force that a reasonable and prudent person would have applied in effecting the arrest under the circumstances shown from the evidence received in this case.

c. Reasonableness Under the Circumstances

If you find that the defendant, or someone you find to be a co-conspirator of the defendant, under the definition of conspiracy as I have previously explained it, used force during the arrests of plaintiff on May 1, 1986 and August 26, 1986, but reasonably believed that plaintiff was resisting or obstructing his arrest, or was attempting to escape and you find that the defendant or a co-conspirator needed to use force either to arrest the plaintiff or to protect himself, you must then decide whether it was reasonable for him to believe that the force he used was necessary.

In making that determination, you must take into consideration all of the circumstances confronting the defendant or a co-conspirator at the time and place of the incident, including but not limited to what he saw and heard; whether the plaintiff was resisting or obstructing arrest or attempting to escape; the amount of force used; whether there was assistance available to the defendant or a co-conspirator; what, if anything, he knew or had been informed about that plaintiff; and what, if anything, he knew or had been informed concerning the nature of the offenses committed. You must consider the circumstances as they reasonably appeared to the defendant or a co-conspirator on the scene at the time of the incident and not from the standpoint of hindsight.

11. Intent

If you find that the defendant or a co-conspirator used more force than was reasonable, you must then determine if he acted intentionally or recklessly. I instruct you that, to establish a claim under section 1983, the plaintiff must show that the defendant or a co-conspirator acted either intentionally or recklessly. If you find that the acts of the defendant were merely negligent, then, even if you find that the plaintiff was injured as a result of those acts, you must return a verdict for the defendant.

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason.

An act is reckless if done in conscious disregard of its known probable consequences.

In determining whether the defendant or a co-conspirator acted with the requisite state of mind, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds, and your belief or disbelief with respect to those facts.

a. Color of State Law

Third Element: The third element that plaintiff must prove by preponderance of the evidence is that the defendant acted under the color of the authority of the state of New York.

Acts are done "under color of...law" of a state, not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and

beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of any law," however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise official powers.

As you will note, the federal statute, which the defendant is alleged to have violated, covers not only acts done by an official under color of any state law, but also acts done by an official under color of any ordinance or regulation of any county or municipality of the state, as well as acts done by an official under color of any regulation issued by any state, or county, or municipal official, and even acts done by an official under color of some state or local custom.

So, the phrase "under color of state law," includes acts done under color of any state law, or county or municipal ordinance, or any regulation issued thereunder, or any state or local custom.

b. Under Color of State Law: When Official Status Not Required

The defendant in this case, Nicholas Manobianco, was not an officer or employee of any agency of the state or political subdivision of the state. He was employed by Adelphi University, a private institution. Accordingly, he was a private actor, rather than a state official. However, an otherwise private person acts "under color of state law" if he engages in a

conspiracy with state officials to deprive another person of federal rights.

I charge you that members of the police force of the Incorporated Village of Garden City are state officials when acting within the scope of their duties as police officers. If you find from the preponderance of the evidence that the plaintiff has established the essential elements of his claim as defined in these instructions, and that the defendant was a willing participant assisting the state or its agent in the doing of the acts constituting the offense, then he is liable even though he held no official position or employment with the state.

On the other hand, keep in mind that the mere furnishing of information or assistance to police officers does not constitute joint action under color of state law under section 1983.

Plaintiff must prove by a preponderance of the evidence that the defendant exercised a power possessed by virtue of state law and was clothed with the authority of state law.

c. Overt Act

Fourth Element: The fourth element that plaintiff has the burden of proving is that the defendant or a co-conspirator engaged in overt acts pursuant to the conspiracy. This means there should be some act done to demonstrate an intent to use excessive force upon the plaintiff in furtherance of the conspiracy.

d. Proximate Cause

Fifth Element: The fifth element that plaintiff must prove by a preponderance of the evidence is that the conspiracy was the proximate cause of the injury to plaintiff.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The conspiracy, therefore, is the proximate cause of injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that a reasonable person would regard it as a cause of the injury.

e. More Than One Proximate Cause

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor, or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

In summary, if you find that the plaintiff has proved each element by a preponderance of the evidence, that is, that the defendant conspired with members of the Garden City Police to use excessive force upon the plaintiff, and that the defendant acted under color of state law, that pursuant to the conspiracy the plaintiff was subjected to excessive force, and that the defendant or a co-conspirator engaged in overt acts in furtherance of the conspiracy, and that the conspiracy was the proximate cause of injury, then you will find for the plaintiff.

If, on the other hand, you find that the plaintiff has failed to prove any of the five elements upon which I have just instructed you, then you must find in favor of the defendant.